STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 18, 2014
v	No. 312977 Saginaw Circuit Court
TOD KEVIN HOUTHOOFD, Defendant-Appellant.	LC No. 05-025865-FH

Before: OWENS, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his sentence of 40 to 60 years' imprisonment for his conviction of solicitation to commit murder, MCL 750.157b. Because the circuit court circumvented the rules regarding the assignment and reassignment of judges, we cannot be confident that defendant was sentenced in a fair and impartial manner. We therefore vacate his sentence, and remand for resentencing before a randomly selected judge. Given our resolution of this issue, we need not consider defendant's remaining challenges to his sentence.[1]

I. BACKGROUND

The facts and procedural history in this case were accurately detailed in this Court's opinion in *People v Houthoofd*, unpublished opinion per curiam of the Court of Appeals, issued February 3, 2009 (Docket No. 269505), rev'd in part 487 Mich 568; 790 NW2d 315 (2010), and were restated in our Supreme Court's opinion, 487 Mich at 572-578. As such, only the procedural history will be summarized here.

This case stems from three lower court cases that were consolidated and tried together in 2006. Following a jury trial, defendant was convicted of obtaining property (tractor, tiller, and trailer) valued over $100 by false pretenses, MCL 750.218, witness intimidation, MCL 750.122, and solicitation to commit murder, MCL 750.157b. He was sentenced to a term of five to ten years' imprisonment for the false-pretenses conviction, ten to 15 years' imprisonment for the

[1] Defendant may raise any challenges to the accuracy of the presentence investigation report before the sentencing judge on remand.

witness-intimidation conviction, and 40 to 60 years' imprisonment for the solicitation conviction. Defendant appealed as of right to this Court, which affirmed defendant's convictions and sentences for false pretenses and witness intimidation, but vacated his conviction and sentence for solicitation due to improper venue. *People v Houthoofd*, unpublished opinion per curiam of the Court of Appeals, issued February 3, 2009 (Docket No. 269505). However, our Supreme Court determined that venue is subject to the harmless error rule and reinstated defendant's conviction for solicitation. *Houthoofd*, 487 Mich at 571. Additionally, the Court remanded the case to this Court "for consideration of whether the trial court failed to articulate substantial and compelling reasons for upwardly departing from the guidelines when imposing defendant's sentences for the solicitation and witness intimidation convictions." *Id.* On remand, this Court vacated defendant's sentence for solicitation and remanded for the trial court to determine whether the departure was warranted, and if so, to explain its reasoning in accordance with *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008). *People v Houthoofd (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued December 2, 2010 (Docket No. 269505). This Court did not address defendant's sentence for the witness-intimidation conviction because defendant did not raise the issue on appeal. Resentencing for defendant's solicitation conviction was held on September 27, 2012. The trial court resentenced defendant to a term of 40 to 60 years' imprisonment, which was the same as the original sentence.

II. VENUE CHALLENGE

As an initial matter, we decline to address arguments raised in defendant's appellate brief that relate to whether venue for the trial was proper in Saginaw County because our Supreme Court has already decided this issue. See *People v Whisenant*, 384 Mich 693, 702; 187 NW2d 229 (1971) (discussing the doctrine of law of the case and noting that a lower court is bound to follow the law as stated by a higher tribunal). Our Supreme Court specifically stated, "Defendant received a fair trial before an impartial jury, and it cannot be argued that there was a miscarriage of justice simply because the trial was in Saginaw County." *Houthoofd*, 487 Mich at 590. Additionally, with regard to whether resentencing should have been to changed to Arenac County, which was the proper venue for trial, we also decline to address this argument, as defendant fails to cite authority to support his proposition that the resentencing must occur where venue would be proper. A party may not leave it to this Court to search for authority to sustain or reject its position. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). Further we note that reassignment to a judge in Arenac County would entail waste and is not necessary to preserve the appearance of justice. See e.g., *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997) (discussing factors to consider when determining whether defendant should be resentenced before a different judge due to judicial bias).

III. RETROACTIVITY OF SUPREME COURT'S DECISION

First, defendant argues that the retroactive application of our Supreme Court's decision in *Houthoofd* violated his due process rights. We review de novo claims of ex post facto violations. See *People v Callon*, 256 Mich App 312, 315; 662 NW2d 501 (2003).

This Court has recently summarized the implications of an ex post facto law:

> The general rule is that judicial decisions are given full retroactive effect, and complete prospective application is limited to decisions that overrule clear and uncontradicted case law. *People v Doyle*, 451 Mich 93, 104; 545 NW2d 627 (1996), quoting *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986). However, due process concerns arise when an unforeseeable interpretation of a criminal statute is given retroactive effect. *People v Brown*, 239 Mich App 735, 750; 610 NW2d 234 (2000). When a retroactively applied judicial decision operates or acts as an ex post facto law, a violation of due process occurs. *Doyle*, 451 Mich at 100. Accordingly, a judicial decision may not be given retroactive effect if the result is that previously innocent conduct is rendered criminal conduct. *Id*. (citation omitted). [*People v Vansickle*, ___ Mich App ___; ___ NW2d ___ (2013), slip op at 4.]

Our Supreme Court held that venue is subject to the harmless error rule, overturning years of precedent that required a conviction to be reversed and a new trial granted if venue was not proven beyond a reasonable doubt. *Houthoofd*, 487 Mich at 592. However, this decision does not operate as an ex post facto law. Our Supreme Court specifically noted that the Michigan caselaw requiring reversal where venue was not proven beyond a reasonable doubt involved cases that were decided before the Legislature's adoption of MCL 769.26 and MCL 600.1645, and thus, were abrogated by statute and no longer applicable. *Id.* Additionally, the Court noted that MCL 769.26 and MCL 600.1645 were adopted years before its decision in *Houthoofd* and specifically addressed general procedural errors and specific venue errors. *Id*. at 591, n 38. In fact, MCL 600.1645 specifically states that a judgment cannot be void solely because venue was improper. Thus, it cannot be said that the Court's interpretation of the statute was unforeseeable, given that the statute was clear and unambiguous and had been the law since it was effective in 1963. Further, contrary to defendant's argument, the prosecutor still must prove venue beyond a reasonable doubt. The only change is that improper venue does require automatic reversal; rather it is subject to the harmless error rule.

IV. ASSIGNMENT OF SENTENCING JUDGE ON REMAND

Defendant also argues that the assignment of retired judge Lynda Heathscott was improper. Judge Heathscott presided over defendant's 2006 trial, and sentenced him to 40 to 60 years' imprisonment for solicitation to commit murder, MCL 750.157b.[2] This sentence represented a substantial upward departure from the sentencing guidelines, which dictated a minimum sentence range of 126 to 210 months. As noted, this Court vacated that sentence after concluding that Judge Heathscott cited several nonobjective and unverifiable reasons for her departure sentence, and failed to explain why the sentence imposed was more proportionate than

[2] Defendant was also convicted of obtaining property valued at over $100 by false pretences, MCL 750.218, and witness intimidation, MCL 750.122. The sentences for these crimes are not at issue in this appeal. The sentence referred to throughout this opinion is defendant's sentence for his solicitation to commit murder conviction.

a within-guidelines sentence. In so doing, this Court expressed awareness that Judge Heathscott had retired and that a new judge would resentence defendant. In a footnote highly pertinent to this appeal, this Court made the following observation:

> While the prosecution requests that this Court remand any further proceedings to the original trial court judge in her retired capacity, the prosecution has provided no authority allowing this Court to do so. A party may not leave it to this Court to search for authority to sustain or reject its position. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). See also *People v Coones*, 216 Mich App 721, 730; 550 NW2d 600 (1996) (defendant's argument that he should be resentenced before a different judge was considered moot because the original judge had since retired, and thus, defendant would "necessarily be resentenced by a different judge."). [*Houthoofd (On Remand)*, unpub op at 9 n 6.]

On remand to the circuit court, Judge Janet Boes, Judge's Heathscott's successor, was assigned to resentence defendant. Judge Boes promptly disqualified herself. She signed a form created by the State Court Administrative Office (SCAO) titled, "Order of Disqualification/Reassignment." On the form, Judge Boes averred that she disqualified herself from resentencing defendant because she "was employed as an assistant prosecutor in the prosecutor's office, from 1989 to August 2008."

Rather than randomly selecting another judge to conduct defendant's resentencing, the chief judge pro tem of the Saginaw circuit court signed and transmitted to SCAO an "Internal Reassignment Request" attesting that Judge Heathscott "has been chosen by lot or local administrative order from the judges not disqualified in this case. I request that this case be reassigned to this judge." On a separate form, a Saginaw circuit court employee stated that Judge Heathscott was being assigned to "assist with docket." When defendant challenged Judge Heathscott's assignment in the circuit court, Chief Judge Robert Kaczmarek issued a written opinion rebuffing defendant's motion. According to Judge Kaczmarek's opinion, Michigan's Constitution allows retired judges to perform further judicial services, and Saginaw County's "heavy caseload" justified the circuit court's request that SCAO assign a judge to "assist with docket." Judge Kaczmarek reasoned, "[R]esentencing by a different judge unfamiliar with this case would further burden the Tenth Circuit Court bench with review of the considerable case materials in this matter."

We do not question Judge Kaczmarek's conclusions that reassignment to a different judge would be burdensome for the Saginaw circuit court, or that Michigan's Constitution permits retired judges to serve as judicial officers in certain circumstances. Our concern flows from the manner in which the Saginaw circuit court handled the reassignment of defendant's sentencing to Judge Heathscott.[3] Rigorous adherence to the rules governing the assignment and

[3] It is important to note that the Saginaw circuit court did *not* advise SCAO of Judge Boes' disqualification. Thus, from SCAO's perspective, this was a simple "assist with docket" request,

reassignment of judges preserves the public's confidence in judicial propriety. Here, the rules were bent. This resulted in a justifiable perception that the prosecution obtained the result it wished for and which this Court had pointedly refused to award: assignment of Judge Heathscott as the resentencing judge.

MCR 8.111(C)(1) sets forth the judicial reassignment procedure promulgated by our Supreme Court:

> If a judge is disqualified or for other good cause cannot undertake an assigned case, the chief judge may reassign it to another judge by a written order stating the reason. *To the extent feasible, the alternate judge should be selected by lot.* The chief judge shall file the order with the trial court clerk and have the clerk notify the attorneys of record. The chief judge may also designate a judge to act temporarily until a case is reassigned or during a temporary absence of a judge to whom a case has been assigned. [Emphasis added.]

Defendant's resentencing was assigned to Judge Boes, as Judge Heathscott's successor. When Judge Boes disqualified herself, MCR 8.111(C)(1) permitted the chief judge to assign the case "to another judge by a written order stating the reason." However, the rule expresses a clear preference for *random* assignment: "assignment by lot." This rule "was intended to prevent judge shopping, to avoid the appearance of impropriety, and to equally distribute the workload of a court among the judge's [sic] elected to that court." *People v Montrose (After Remand),* 201 Mich App 378, 380 n 1; 506 NW2d 565 (1993). Regarding the predecessor to MCR 8.111(C) this Court has stated:

> The purpose behind GCR 1963, 926.3 regarding reassignments is obvious. By promulgation of the rule the Supreme Court has sought to eliminate any appearance of judicial impropriety. Such impropriety, actual or apparent only, would present itself in a system whereby the chief judge of a judicial circuit could reassign cases at will without reason. While parts of GCR 1963, 925.5 could be seen as providing the chief judge with broad powers to reassign cases, given the specific language of GCR 1963, 926.3 and the policy reasons behind the rule, we do not believe an expansive construction of GCR 1963, 925.5 is justified. [*Armco Steel Corp v State, Dep't of Treasury*, 111 Mich App 426, 438; 315 NW2d 158, (1981).]

To further promote transparency in reassignment, section IV of SCAO's published "Judicial Assignment Procedures" strongly counsels against the maneuver employed here:

> B. SCAO Selects Judges in Disqualification Cases
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> Courts are prohibited from recommending to the State Court Administrative Office the name of a judge for a disqualification assignment. *If a*

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rather than a reassignment resulting from a disqualification. Nothing in the record suggests that SCAO acted inappropriately.

court suggests a judge for a disqualification assignment, that judge will be eliminated from consideration by SCAO. [*Id.* at 12 (emphasis added).]

The same procedure manual states as to "assist with docket assignments:"

> The purpose of an assist with docket assignment is for a judge to assist a court having a heavy caseload or a backlog of cases or to cover when a judge is absent because of illness, vacation, attendance at conference, or for other reasons which require the assistance of an outside judge. The assignment may cover specific days or time periods or may be an assignment to handle a specific case. [*Id.* at 1.]

The court rule and the SCAO procedures recognize the potential danger that inheres when a trial court selectively assigns cases. Even a hint of personal interest on the part of a judge or a circuit court bench should be avoided. Enforcement of the court rules and SCAO guidelines promotes Canon 2(A) of the Code of Judicial Conduct, which directs that judges "avoid all impropriety and appearance of impropriety." Moreover, requiring random selection forecloses the bench from being driven by "possible temptation . . . which might lead [it] not to hold the balance nice, clear and true between the state and the accused[.]" *Caperton v Massey Coal Co, Inc*, 556 US 868, 878; 129 S Ct 2252; 173 L Ed 2d 1208 (2009) (quotation marks and citation omitted). As advised in *Caperton*, no man can judge his own case and, as an extension of that principle, no man can choose his own judge. *Id.* at 886. To protect the interests of impartiality on the other side of that coin, no court should select a particular judge to hear a particular man's case.

Here, the record fails to substantiate that Saginaw County's generally "heavy caseload" required the assignment of a *particular* judge to handle a *particular* resentencing. MCR 8.111(C) and the SCAO assignment procedures in disqualification matters make it clear that courts must take care to avoid arranging for hand-selected judges to preside over hand-selected matters.

Moreover, a circuit court may not freely invoke a "heavy caseload" to avoid the procedure otherwise called for when a judge disqualifies herself. Although MCR 8.111(C)(1) permits the chief judge to assign a case "to another judge by a written order stating the reason," this Court had clearly stated that "no authority" permitted a remand "to the original trial court judge in her retired capacity." While we make no finding of actual bias on the part of Judge Heathscott, defendant is justified in complaining that the procedure employed worked an end-run around this Court's ruling, and contravened the court rule. We therefore remand for resentencing before a Saginaw circuit judge assigned by random draw.

We vacate defendant's sentence and remand for resentencing before a randomly selected judge. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher